

FOR THE DEFENSE

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Expert Spotlight

Q&A with the author of
Tennessee Criminal Law
and TACDL member David Raybin



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Tennessee Association of Criminal Defense Lawyers

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David Raybin is a renaissance man. Lawyer, author, and sword fighter, he is a man of many hats. We recently talked about law, lobbying, client management, and mental patients in a Nashville meat and three. We discussed David Raybin's "Life in Court."

FTD - You were just talking about writing a memoir?

DR - I was inspired to be an attorney when I was about seventeen years old. I was really sick for several weeks, and my father brought home some books for me to read. He brought me fantastic books about fighter pilots in WWII. He also brought Louis Nizer's My Life in Court, which is a fabulous book. It was one of the first lawyer memoir books. I decided I was going to be a fighter pilot or a lawyer, but I decided there really wasn't a difference between the two. A good trial lawyer is basically in combat all the time. The other inspiration was my Virginia military high school fencing team. Fencing is very fast, one-on-one combat. Military school is highly regimented with rules and regulations – like the law, and it all came together about being an attorney in some way. I didn't know a lot of folks that had lawyers in their families and I had no lawyers in my family. I just did this on my own, because it seemed interesting. I had a tremendous interest in history, and I wanted to be a history teacher. When I learned what history teachers were paid, I decided that was not the way to go.

FTD- I am married to a history teacher, and that's still true.

DR- Our military school in Virginia – which is closed now -- was started by a soldier in Jeb Stuart's cavalry unit. Virginia is nothing if not the Civil War. There was a girl's school in Virginia, where we dated, started by Jeb Stuart's widow.

[Just then our meal of fried chicken, black-eyed peas, collard greens, and corn arrives with refills of tea. Oh, how the South has changed.]

DR- I went to UT law school, and back then, UT law school had this philosophy of accepting just about anybody, and flunking out two-thirds of the class. I am sure you have heard this story before, where you are in law school and they say, "Turn to the left. Turn to the right. Only one of you will be here come graduation." That was true. Back then, they had the quarter system, instead of semesters, so I went nine quarters straight. I didn't want to take off because I couldn't afford to support myself for a summer. It was the baby boom, and there were no jobs anyway.

I just really, really, really enjoy the law. I enjoy writing about the law, and I enjoy the history of the law. That's where my love of history came in. I wrote several law review articles about the history of Tennessee criminal law, and the lead article was about the proposed 1973 criminal code. That formed the basis of the 1989 criminal code which we used when I later served on the sentencing commission.

Anyway, as I was graduating UT, the Attorney General's office needed more lawyers. The entire office had maybe twenty lawyers. The number of appeals was increasing

dramatically, and they needed more young kids to do those appeals. They read my law review article and decided they would offer me a job at the AG's office here in Nashville.

FTD - And you stayed in Nashville ever since?

DR - Yes. The AG's office was like a post-graduate degree in law because I had to write all those briefs. I argued a lot of appellate cases, and really enjoyed the advocacy.

FTD - Because you have written legal treatises and had such success in the appellate courts, many people consider you an appellate lawyer, but you have said twice during lunch you are a trial lawyer. Do you consider yourself one or the other? Or just a lawyer?

DR - I started out as an appellate lawyer, and I wrote all these law books, and I still do my share of appeals, but most of what I do is trial work. It just makes me a better trial lawyer to have that appellate expertise, so that I know what the heck I am doing. When I am in the trial court, it gives me an edge on my motions. Particularly on my motions.

FTD - Do you think it creates problems in the legal system when district attorneys, don't perform appellate work, and just stay inside their own bubble? Is it a problem if we have assembly line justice and district attorneys don't see the bigger picture of the system?

DR - Damn. That's a good question.

FTD - I'm pretty sure no one has ever said that before, so thank you.

DR - That's how I ended up in the District Attorney's office. I did two things up there. First, nobody wanted the death penalty cases, because so much was going on, so they gave them to me. Here I am at age 28 doing death penalty litigation. The first case I draw is the Supreme Court reviewing the constitutionality of the mandatory death penalty. Of course the mandatory death penalty is illegal, but I researched it, and argued as hard as I could even though I knew I would lose. When it was declared unconstitutional, the legislature says "Attorney General, you need to write a death penalty statute that is going to stand up in court." The Attorney General said "Come here Raybin, and write the law since you are supposed to know this stuff." I flew all over the country consulting with lawyers and prosecutors who were in the same boat. We came up with a *Gregg vs. Georgia* statute like we have now, but I drafted the Tennessee version. One of the aggravating factors was killing an assistant state attorney general. I put myself in the statue, so if somebody killed me, they would get the death penalty for it.

To actually answer your question, the other thing that I did was contact the DAs and on significant cases say, "I need to meet with you to discuss this case." I realized that the district attorneys were completely disconnected from appeals. That just shocked them, because nobody in the AG's office had ever picked up a phone and called them.

FTD - I had a prosecutor in the trial court recently argue in the trial court that a case stood for a certain position, and I thought, "Jesus, I know that's not true. I have that issue

pending now.” I went and looked up the case the ADA was talking about. The specific issue was never even raised on appeal. I’m thinking, “How the hell can you sit there and argue that?” But I know they just don’t have any idea what is happening elsewhere.

DR - Right. I got assigned the famous String Bean murder case. He was a country music singer killed in Nashville along with his wife, and it was one of the worse homicides in the community. I call up DA Tom Shriver, and I said, “You need to come up here when I argue this case. You need to sit next to me in the Court of Criminal Appeals as I am arguing the case.” He was just amazed that I asked him to do that. I said, “You need to help me, this is your case. I want to do the best I can, so I’ll need you to be here.” I won the appeal. Six months later, Shriver calls me up and says, “I’ve got an opening. Get your butt down here and try to win some lawsuits.” I went down to the DA’s office in Nashville for seven years. My appellate experience helped me tremendously from keeping the judge from falling into error. I don’t think any case that I prosecuted ever got reversed.

FTD - TACDL is putting a lot of money into lobbying lately, but I notice sometimes the legislature brings you up there independently from TACDL to speak on the law. It seems to be an honorable and elevated position. Does that date back to your time with the AG?

DR - It goes back to my days in the Attorney General’s Office. When I am speaking on behalf of TACDL and talking in front of those conservatives, about the fifth line in my presentation, I’ll remind them that, “I have been here in front of you for so many years. Some of you may recall that I talked to you about the Death Penalty statute that I drafted.” It gives me some connectivity to the past. I want to appear objective about what the law should be, so it helps me. Those contacts that I made in the Attorney General’s office 30 years ago still help me to this day. It a tremendous experience, I really enjoy doing that.

FTD - What piece of advice would you give to a young lawyer learning appellate work?

DR - Go to Westlaw. Westlaw has all the appellate briefs online right now for the most recent cases. Go read as many appellate briefs as you can to see how it’s done. Read the cases where the attorney won. If you’re a trial lawyer, the best way to learn, aside from trying cases yourself, is watching other lawyers do it. To learn about appeals, get yourself up to the appellate court to watch some oral arguments.

FTD - When do you decide to request an oral argument?

DR - I always request an oral argument. If the case is worthy of me being the lawyer, it’s worthy of me standing up and arguing on behalf of my client. There is no question that oral argument does bring the appellate judges around. I am absolutely convinced that happened in some of my appeals. Now is that true in every case? No. I just think it is malpractice to have an appellate case and not argue your client’s position. Appellate briefs are wonderful, but get in there and play hard.

My other advice is figure out how to write a motion for new trial. If you don't know how to do a motion for new trial, you are worthless as an appellate lawyer, because that is your appeal. Another thing, always be prepared to argue an issue that your client wants presented unless it's absolutely frivolous. My son had an appointed case in the Supreme Court dealing with forfeiture of a house. He worked and worked on the issue, and the client suggested argument on a procedural problem. They gave the client constructive notice, but they didn't give him actual notice. To prevail on that the Court would have to overturn fifty years of case law. The client was *pro se*, and Ben had been appointed by the Supreme Court to present the client's arguments. It wasn't totally frivolous, so Ben presented it. The opinion came out, and they overruled fifty years of case law. Ben won on this obscure procedural point that the client wanted briefed. Great result. Great lesson learned.

And write the Rule 11 Application for permission to Appeal in the Supreme Court. That poor devil is sitting in prison. He has got sixty days running, and he doesn't know what to do, and his time lapses. I don't care who you are, paid or not. There is a moral duty to do it. Your client is absolutely out there all alone.

FTD - I feel the same way. I don't think I've ever been paid on a Rule 11. By the way, I have a perfect appellate record with the Court of Appeals, and on Rule 11 applications.

DR – [chuckles] Well just keep swinging, That's all.

FTD - I happened to be up here about a year ago when you spoke at the Roundtable. One of the ideas you suggested is that we should change to 13-point font in briefs and pleadings. I do that now, and I am amazed how much more the judges are aware of my argument in trial courts. It seems like even when I lose on appeal, I've had some nice comments in the opinion.

DR - As a lawyer, you become a lot smarter once you go to 13-point font.

FTD - I've had much better success at suppression motions because now my motion is a page turner!! It probably is just not as hard on their eyes.

DR - I try to write as distinctly as I can with very short paragraphs, very short bullets, and very short themes. Bang, bang, bang, and thank you. Judges are smart people. They get it.

FTD – You also had some interesting positions on client communications.

DR - In twenty-percent of my cases, I am the lawyer because the client had another lawyer but that other lawyer wouldn't communicate with the client. So the client fires the first lawyer and hires me. Now that is crazy when a lawyer loses a client because of a lack of communication. Lawyers won't call the client back, and that is inexcusable. It makes no sense. Why would you not communicate with your own client?

FTD - I have been getting wonderful results from your 10-minute phone call rule. I now have a timer on my phone, to manage many clients that are high maintenance. Ten minutes isn't really a big ask of a lawyer. I am shocked about how many more people I can communicate with during the day.

DR - The 10-minute rule: unless I am talking to the DA about a death penalty case. I may give him 20 minutes. That's it, ten minutes. If it's longer than 10 minutes, I will send an email, or bring them in for a meeting. You are just wasting time, because then you make yourself inaccessible to anybody else. None of these points in my PowerPoint presentation were my idea by the way. They are all my wife's idea. She is not a lawyer. She is a psychologist. I am yelling, "The client is late to court." She said, "Tell them to be there at eight, and they will show there on time at nine."

FTD – What is your proudest moment in court?

DR - Without a doubt when I got my son sworn in as an attorney in the Supreme Court. I thought I was going to burst. And I remembered myself being sworn in by the Supreme Court. I was in the Attorney General's Office, and I passed the bar. The Attorney General said "by the way, the Supreme Court is sitting downstairs." We went downstairs and got sworn in under the exact same spot I now argue my appeals. One of the Supreme Court Judges turned to me said, "now that I have sworn you in, go out there and do justice." I said "Yes, sir!" When Ben got sworn in, they just granted the motion and there were dozens of lawyers there and no time for a personal word to each person. So, I put my arms around him, and I said "Ben, go out there and do justice." Having my son in my practice is like starting all over again for me. I am just thrilled to have him there with me. I have learned more from him than he has learned from me. It's just wonderful.

FTD - I think the swearing in line I remember most was from Cornelia Clark. She said as a lawyer the most precious currency is your reputation. I remember that almost daily.

DR - I had a conversation the other day where the DA has called me complaining about some lawyer. He said that lawyer used to be in the DA's office and I used to respect that lawyer, but now that lawyer has gone into court and done some damn fool thing. I have always learned that you can do 10,000 good things as a lawyer, and screw it up with one bad thing especially with shortcuts. That shortcut can carry the appearance of impropriety that sticks with you. The bar has a long memory. They have a long damn memory. If you screw up, they will remember it for the rest of your career, and maybe beyond.

FTD -Your partner and mentor Mr. John Hollins Sr. passed this year.

DR - He was retired. It was a very short illness. He had been practicing for 56 years. He was the most ferocious lawyer I've ever seen in the courtroom. He was like a bear.

FTD - I think you called him a lion when *the Tennessean* interviewed you.

DR - He was a lion. He was an absolute lion. He would yell at anything that moved. He was not a bully, but he got away with yelling. He was one of those power lawyers who knew how to be gentle, and when to be persuasive. He was very loyal to his allies and just broke his adversaries. There was a famous story about John Hollins. In my conference room, you may have noticed that the conference table had glass on it. It's because John Hollins turned out to be one of the best divorce lawyers in the city and could eat husbands alive. So he was taking a deposition of this husband and crucified the man. They took a break but when they came back, the husband was gone. Scratched into the wooden tabletop was "Fuck John Hollins." We had to get that sanded down, and added a glass top so that wouldn't happen again. John was so proud of that he wanted to leave it in there!

FTD - Do you feel any different being the senior member of your firm?

DR - No. I don't feel any different at all. I do have the benefit of experience, but that is a great asset. But I don't feel old. Rob McKinney and I were sitting around talking one day. He said the shelf life of a trial lawyer is about 40-45 years, because of the intensity of how hard you have to work. Constantly. Well, some burn out before then.

FTD - I'll never last that long.

DR - I am close to that time. I am 67-years old. I have been doing this since 1974. But I have a 10-year window in there since I was a DA. My defense trial work didn't really start until Ben was born, so I can measure my shelf life by his age.

FTD - Do you feel more pressure when you prepare as a defense attorney then as a DA?

DR - Absolutely not. I was ferocious. Some cases you just couldn't prepare. The ones you think are going to trial plead out, and you are left with some dog cases. I can't say that I prepared all my cases with the same diligence I do now. But as a prosecutor, I worked my butt off to prepare. It was how I learned that you can't win without any investigators. It's crazy. I can't do it all myself. And I am a firm believer in a team defense. It's a good idea having multiple lawyers, have investigators to help you. That always gives you more insight on a case that you didn't know before.

FTD - What makes TACDL important?

DR - The most obvious advantage is the listserv. It truly is a wonderful thing. I put something up on the listserv, and within a few hours or a day at most, I get an answer back. We just share information. If TACDL did nothing else, it's a benefit that you would want to have, but the obvious benefit is the camaraderie and the exchanging of ideas. You cannot be a good lawyer at the trial level or the appellate level unless you have vetted your cases with another lawyer, for purposes of getting a reality check. That's what TACDL does. It gives you an opportunity to talk to someone who just won four cases on forfeiture. I am going to call that person and find out how they did it. It's great. You win a few cases, and suddenly you are an expert. The prosecutors and police meet. They get

this flow of information, why shouldn't we meet and talk to each other about these things? The Trial College that Bill Massey puts on. My God, that is just a fantastic thing.

FTD – I am a hat man, and see that you also wear hats often. I think I wear them from playing football, and I need helmet for the game. Why do you wear hats?

DR – Because I have less hair than I used to!

FTD – What is the funniest thing you see in a courtroom?

DR - [Reflects for a moment over his pecan pie and coffee] I see it all the time: asking the stupid question and getting killed. Once I was trying to put on a mental patient as a critical defense witness. The DA objects, claiming the fellow is incompetent. The judge tells the DA to *voir dire* my witness to establish incompetence. "OK" says the DA as he marches up to the podium with the witness now on the stand. "So!" asks the DA in a dramatic flair, "isn't it true that you are in a state of confusion?" "No sir," the fellow answers, "I am in the State of Tennessee!" The judge explodes with laughter, and the DA crawls back to his seat. It is moments like that which I will put in my memoirs. The famous trial lawyer, Jim Neal, once said that a law degree is a ticket to a great career. Absolutely right; I love it.

Mike Working is the Owner of the Working Law Firm in Memphis where he enjoys the blues and shopping for blue suede shoes. He is also the Chair of TACDL's Membership Committee. If you have any ideas about increasing membership or featuring a current member in this column, he would welcome the suggestion.